

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JENNIFER McARTHUR,)
Plaintiff,) ORDER GRANTING IN PART AND
v.) DENYING IN PART DEFENDANTS'
THE ROCK WOODFIRED PIZZA &) MOTIONS IN LIMINE
SPIRITS, *et al.*,)
Defendants.)

I. INTRODUCTION

This matter comes before the Court on Defendants' Motions In Limine. Dkt. #98. Plaintiff does not oppose several of Defendants' motions, but opposes others. Dkt. #100. For the reasons set forth herein, the Court now GRANTS IN PART AND DENIES IN PART Defendants' Motions In Limine.

II. LEGAL STANDARD

Parties may file motions in limine before or during trial “to exclude anticipated prejudicial evidence before the evidence is actually offered.” *Luce v. United States*, 469 U.S. 38, 40 n.2, 105 S. Ct. 460, 83 L. Ed. 2d 443 (1984). To resolve such motions, the Court is guided by Fed. R. Evid. 401 and 403. Specifically, the Court considers whether evidence “has any tendency to make a fact more or less probable than it would be without the evidence.” and

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1 whether “the fact is of consequence in determining the action.” Fed. R. Evid. 401. But the
2 Court may exclude relevant evidence if “its probative value is substantially outweighed by a
3 danger of one or more of the following: unfair prejudice, confusing the issues, misleading the
4 jury, undue delay, wasting time, or needlessly presenting cumulative evidence.” Fed. R. Evid.
5 403.

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7 III. DISCUSSION

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A. Motions In Limine 1, 4, 5, 6, 8, 9

9 Defendants have proposed a number of standard Motions In Limine which Plaintiff
10 does not oppose. Dkts. #98 at 2-5 and #100 at 1-2. Accordingly, the following Motions In
11 Limine will be GRANTED:

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- 13 1. Exclusion of Non-Party Witnesses from Courtroom
 - 14 4. References to Cost of Litigation
 - 15 5. References to Defendants’ Financial Status or Ability to Pay a Judgment
 - 16 6. Golden Rule Arguments
 - 17 8. Written Experts’ Curricula Vitae
 - 18 9. Written Experts’ Reports

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B. Motions In Limine 2 and 3

21 Defendants have proposed a number of additional standard Motions In Limine, to which
22 Plaintiff has objected on the basis that they are “not appropriate motions in limine.” Dkts. #98
23 at 2 and 6. The Court has reviewed Motions In Limine 2 (references to offers to settle or
24 compromise) and 3 (references to insurance), and finds that these motions are appropriate and
25 have a valid legal basis. Accordingly the Court will GRANT those motions.

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C. Motion In Limine 7

1 Defendant asks the Court to exclude the offering of any evidence, the making of any
2 comments or arguments, or the asking of any questions relating to sending a message,
3 punishing, or deterring the Defendants. Dkt. #98 at 4. Plaintiff responds that she is seeking
4 punitive damages in this lawsuit, and therefore argument related to such damages is proper.
5 Dkt. #100 at 2.

6 The Ninth Circuit has not yet settled the availability of punitive damages in cases
7 asserted under the FLSA. *See Lambert v. Ackerley*, 180 F.3d 997, 1011 (9th Cir. 1999) (“[W]e
8 do not reach the question because the defendants have waived the issue of the availability of
9 punitive damages by failing to raise it below.”). Only two circuits have addressed the
10 availability of punitive damages and those circuits are split. *See Snapp v. Unlimited Concepts,
11 Inc.*, 208 F.3d 928, 933-34 (11th Cir. 2000) (holding that punitive damages are not available
12 under the FLSA); *Travis v. Gary Comm. Mental Health Ctr., Inc.*, 921 F.2d 108, 112 (7th Cir.
13 1990) (holding that punitive damages are available under the FLSA). District Courts in the
14 Ninth Circuit have likewise split on the availability of punitive damages. *See, e.g., Campbell-*
15 *Thomson v. Cox Communs.*, No. CV-08-1656-PHX-GMS, 2010 U.S. Dist. LEXIS 43977, 2010
16 WL 1814844, at *10-11 (D. Ariz. May 5, 2010) (punitive damages available); *Tumulty v.*
17 *FedEx Ground Package Sys., Inc.*, No. C04-1425P, 2005 U.S. Dist. LEXIS 25997, 2005 WL
18 1979104, at *10-11 (W.D. Wash. Aug. 16, 2005) (Pechman, J.) (punitive damages
19 unavailable). Given the absence of authority in the Ninth Circuit on this issue, the Court will
20 DENY Defendants’ Motion In Limine to the extent that it seeks to limit Plaintiff to asking for
21 compensatory damages only, unless or until the Court determines that such damages are not
22 available.

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24 **D. Motion In Limine 10**
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1 Defendants next seek an Order excluding lay witness opinion testimony except as
2 provided by Federal Rule of Evidence 701. Dkt. #98 at 5. Specifically, Defendants seek to
3 preclude Plaintiff from testifying that she had to stop breastfeeding when her child was 11
4 months old due to a lack of milk production that resulted from Defendants alleged failure to
5 provide her with breaks for pumping. Dkt. #98 at 5. Defendants argue that such testimony is
6 not supported by credible, contemporaneous medical testimony, and can only be provided by a
7 qualified expert in the field. *Id.* Plaintiff argues that her opinion is relevant to her alleged
8 emotional distress, and that she can testify as to her own decrease in milk, and her own beliefs
9 as to why her milk production decreased. Dkt. #100 at 2-3.
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11 The Court agrees with Plaintiff. At this point in time, it does not appear that she seeks
12 to testify to improper expert opinions as to the reasons for her decrease in milk production.
13 Any objections to specific testimony may be raised at the time of such testimony at trial.
14 Further, Defendants may cross-examine Plaintiff as to any medical evidence she may have (or
15 not have) supporting her beliefs. Accordingly, the Court DENIES Defendants' Motion In
16 Limine.
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18 **E. Motion In Limine 11**

19 Defendants request 24-hour notice of each witness and exhibit to be called or used at
20 trial. Dkt. #98 at 5. Plaintiff does not agree to provide prior notice of any exhibits she intends
21 to introduce, and only agrees to disclose next day witnesses within one hour after court has
22 adjourned or by 1:00 p.m. on the next business day, whichever is later. Dkt. #100 at 3.
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24 With respect to witnesses, the Court notes that regardless of what the parties request, the
25 Court requires 24 hour notice of witnesses to be called, and will typically ask the parties to
26 identify next day witnesses prior to convening court each day. Accordingly, the Court
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1 GRANTS that part of Defendants' motion in limine and expects all parties to be prepared to tell
2 the Court and each other which next day witnesses will be presented.

3 With respect to exhibits, the Court will not require any party to provide notice of
4 exhibits they expect to present, as those decisions are often made during trial based on
5 testimony of the witnesses. Further, the parties have already identified exhibits they plan to use
6 in their proposed Pretrial Order, and no party is required to disclose exhibits used for
7 impeachment purposes only prior to using such exhibits. Accordingly, that portion of
8 Defendants' motion is DENIED.

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10 **F. Motion In Limine 12**

11 Defendants next seek an Order precluding Plaintiff from testifying that other people told
12 her they were asked to work off the clock without pay and that they were compensated in other
13 ways. Dkt. #98 at 6. Defendants assert that Plaintiff has no personal knowledge of such
14 requests, and that such unsupported testimony would be too prejudicial to Defendants. *Id.*
15 Plaintiff responds that she has personal knowledge of what she was told. Dkt. #100 at 3.
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17 The Court DENIES Defendants' motion as premature, and on the basis that the more
18 appropriate objection may be grounded in hearsay. Until such testimony arises, and the Court
19 can evaluate the context in which such testimony is offered, the Court cannot grant any motion
20 to exclude such testimony.

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22 **G. Motion In Limine 13**

23 Defendants seek an Order prohibiting any counsel from expressing personal opinions
24 regarding the validity of their clients' contentions and testimony or other witnesses' contentions
25 and testimony. Dkt. #98 at 6. Plaintiff opposes this motion on the basis that it is really a
26 motion for summary judgment made under the guise of a motion in limine. Dkt. #100 at 3-4.
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1 The Court DENIES Defendants' motion as premature. Until such situation arises, and
2 the Court can evaluate the context in which any comments or argument are made, the Court
3 cannot grant such a motion.

4 **H. Motion In Limine 14**

5 Defendants next move to require Plaintiff to provide supplemental information about
6 the damages she plans to request. Dkt. #98 at 6-7. Although brought as a Motion In Limine,
7 the Court notes that Defendants have not actually asked the Court to preclude any specific
8 evidence, and instead simply complain that Plaintiff has failed to provide adequate damages
9 calculations. *Id.* This is not a proper Motion In Limine. Therefore, the Court DENIES the
10 motion.

11 **I. Motion In Limine 15**

12 Defendants seek an Order precluding Plaintiff's economic expert from testifying as to
13 his opinions on restaurant profitability and labor costs on the basis that such opinions are
14 irrelevant and misleading. Dkt. #98 at 7-8. Defendants also move to preclude Plaintiff's
15 economic expert from testifying to any opinions beyond those disclosed in his written report(s).
16 *Id.* Plaintiff argues that the opinions offered by her expert are relevant, and that Defendants
17 have not claimed her expert is not qualified. Dkt. #100 at 13-14.

18 The Court is not convinced at this time that Plaintiff's expert economist's opinions are
19 irrelevant or misleading. Further, the Court finds Defendants' motion to be premature. Until
20 Plaintiff's expert economist is offered to testify, and the Court can evaluate the context in
21 which any such testimony is offered, as well as other evidence presented at that point in time,
22 the Court cannot grant such a motion. Accordingly, Defendants' motion is DENIED.

23 **J. Motion In Limine 16**

1 Defendants next move to exclude witnesses for which Plaintiff has failed to provide
2 contact information prior to the presentation of the Pretrial Order. Dkt. #98 at 8-9. Plaintiff
3 asks the Court to apply a “principled approach” to the exclusion of witnesses. Dkt. #100 at 14.
4 No party identifies any specific witnesses, or presents any evidence that there are witnesses
5 who will be presented that either party was unable to contact. Accordingly, this motion is
6 DENIED. Any issues involving specific witnesses can be more fully addressed during the
7 parties’ pretrial conference with the Court.

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9 **K. Motion In Limine 17**

10 Finally, Defendants move to exclude Plaintiff’s proposed lactation specialist Cynthia
11 Good Mojab. Dkt. #98 at 9-18. For a number of reasons, Defendants argue that her opinions
12 are inadmissible, including that she is not qualified to provide certain opinions, some of her
13 opinions are unfairly prejudicial, and they are not based on reliable methodology. *Id.* Plaintiff
14 responds that her expert’s opinions are both reliable and relevant. Dkts. #100 at 14-15 and
15 #106.

16 The Court has reviewed Defendants’ motion and Plaintiff’s opposition thereto, along
17 with the expert report provided by Ms. Mojab and Ms. Mojab’s Declaration in opposition to
18 Defendants’ motion. Dkts. #98, #99, Ex. 5, #100 and #106. Having conducted this review, the
19 Court agrees with Defendants, for the reasons stated in their motion, that Ms. Mojab is not
20 qualified to provide medical opinions regarding alleged physical harms suffered by Plaintiff,
21 and that none of her opinions with respect to alleged physical and psychological harms to
22 Plaintiff and her child are reliable, particularly given that she did not review Plaintiff’s medical
23 records. In addition, the Court agrees that Ms. Mojab’s general opinions about what harms
24 could be suffered by a mother who could not express milk or a child who could not receive
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1 expressed milk, are irrelevant and/or more prejudicial than probative. Finally, the Court notes
2 that Ms. Mojab has never testified as an expert witness either in deposition or at trial in any
3 court prior to this case. Accordingly, the Court GRANTS Defendants' motion and
4 EXCLUDES Ms. Mojab as an expert witness in this matter.

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7 **IV. CONCLUSION**

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9 Having reviewed Defendants' motions in limine, the opposition thereto, and the
10 remainder of the record, the Court hereby ORDERS that Defendants' motions (Dkt. #98) are
11 GRANTED IN PART AND DENIED IN PART as set forth above. Counsel shall inform the
12 parties and their witnesses of the Courts rulings on these matters, and everyone shall abide by
13 them when presenting evidence and testimony during trial.

14 DATED this 14th day of April 2017.

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18 RICARDO S. MARTINEZ
19 CHIEF UNITED STATES DISTRICT JUDGE
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